the other two cents. The holders of shares of low value were thus placed in a class assessed more heavily than the class of holders of shares of high value.[2]

Undoubtedly, much latitude is allowed legislatures in classifying the subjects of taxation; and probably the courts are more ready to see a possible reason for the classification made, even if convinced of its error themselves, than in any other sort of case introducing complaint as to unequal protection of the laws.[3] And to privilege taxes especial freedom has been given. License taxes for occupations are supported, though not graduated on the extent of the business of the different individuals of the same occupation.[4] A stamp tax may be imposed on agreements to sell made at exchanges, while not on agreements to sell made elsewhere.[5] And in the case of taxing the transfer of stocks or bonds, the classification of the values of the privileges taxed may be even on the basis of the securities' face value. This, though unquestionably unfair in cases where the real worth has fallen below par, is held to be a reasonable means of ascertaining the value of the privilege exercised, — this result being backed, no doubt, by the practical difficulty of determining the real value of such securities by any method.[6] An earlier form of the law, to which the statute complained of was an amendment, had been to this effect, and accordingly had been upheld.[7] But the amendment sought to make a classification that was fanciful and arbitrary. If only the tax had been for this fixed amount on the transfer of each certificate instead of on the transfer of each share, it might perhaps have been upheld on the analogy of the war stamp tax imposed by the federal government on every check for whatever amount drawn. But, as it was framed for the transfer of shares, a transferor was taxed little or much according to the accident of the division of his corporate securities into a less or greater number of shares. The possibility of a valid reason for not making the rate per cent an equal burden on all, for the lack of which courts are constrained to declare such statutes unconstitutional, was absent.

RECENT CASES.

ADMIRALTY — JURISDICTION — SUIT FOR HIRE OF DREDGE. — A sea-going hydraulic dredge which operated afloat was employed to mix and pump silt from a navigable river to certain meadow lands. Suit was brought for its hire. *Held*, that the non-maritime character of the employment does not oust admiralty of its jurisdiction. *Bowers Hydraulic Dredging Co.* v. *Federal Contracting Co.*, 148 Fed. Rep. 290 (Dist. Ct., S. D. N. Y.).

The court intimates that it would have refused jurisdiction in this case, but for a holding of the United States Supreme Court, in a case of damage caused to a structure by a ship, that the distinction between fixed and floating structures is artificial. *The Blackheath*, 195 U. S. 361. But that case is not directly in

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[2] But *cf.* Cox *v.* Texas, 202 U. S. 446, 450.
[3] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 562, 563.
[4] St. Louis *v.* Sternberg, 69 Mo. 289; Cooley, Taxation, 3 ed., 261.
[5] Nicol *v.* Ames, 173 U. S. 509.
[6] Bell's Gap R. R. Co. *v.* Pennsylvania, 134 U. S. 232.
[7] People *ex rel.* Hatch *v.* Reardon, 184 N. Y. 431; aff. in U. S. Sup. Ct., Jan. 7, 1907. See 19 HARV. L. REV. 460.

point. Neither case suggests a satisfactory test of what determines the jurisdiction of admiralty over floating structures, nor do the numerous cases involving dredges establish any definite criterion. The cases mention, as tending to establish admiralty jurisdiction, capacity to navigate, employment in dredging harbors, and the fact that dredges are usually adjuncts to scows used in transporting the dredged material. See *The Alabama*, 22 Fed. Rep. 449; *The Starbuck*, 61 Fed. Rep. 502. But it is believed that the proper test is independent of the nature of the employment, — that it is whether the dredge is capable of moving about upon navigable waters. See *McMaster* v. *One Dredge*, 95 Fed. Rep. 832. The theory of such test is that as the mobility of a structure on navigable waters subjects it to all the admiralty rules which govern other craft as to lights, collisions, salvage, etc., it should therefore be subject to general admiralty jurisdiction. *The Floating Elevator Hezekiah Baldwin*, 8 Ben. (U. S.) 556; *Saylor* v. *Taylor*, 77 Fed. Rep. 476; *cf.* U. S. REV. STAT. § 3; *De Lovis* v. *Boit*, 2 Gall. (U. S.) 398.

ADVERSE POSSESSION — CONTINUITY — PRESUMPTION OF AGENCY FROM RELATION OF PARENT AND CHILD. — A statute gave title to one holding land adversely for seven years with color of title. The plaintiffs claimed as heirs of a deceased sister who at her death had color of title, but not possession. After her death the plaintiff's father entered adversely to the defendants, the true owners. On his death the plaintiffs entered, but had not yet occupied for seven years. *Held*, that the plaintiffs cannot avail themselves of their father's possession. *Barret* v. *Brewer*, 55 S. E. Rep. 414 (N. C.).

As color of title is probably inheritable, the plaintiffs apparently possessed one of the two statutory requirements. See *Sears* v. *McBride*, 70 N. C. 152; *Neal* v. *Bartleson*, 65 Tex. 478. The question being then as to possession, the plaintiffs' title depended on whether they could take advantage of their father's possession, which was possible only if their father held under their color of title as their agent. In the absence of direct evidence that the father held as agent, the theory was advanced that a presumption of agency arose from the relationship, in view of the duty of a parent to safeguard the interests of his children. It has been held that there is a presumption of permission by the child when a parent occupies his child's land. *O'Boyle* v. *McHugh*, 66 Minn. 390. But the better view is that even such a presumption is unjustified and that the fact of relationship may simply modify evidence otherwise convincing. *Allen* v. *Allen*, 58 Wis. 202. And, in general, relationship is held to create not even a rebuttable presumption of agency. *Francis* v. *Reeves*, 137 N. C. 269; *Ritch* v. *Smith*, 82 N. Y. 627.

BANKRUPTCY — PRIORITY OF CLAIMS — ASSIGNMENT BY WAGE-EARNER. — § 64 of the Bankruptcy Act of 1898 enumerates among debts accorded priority, "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant." *Held*, that one to whom such claim was assigned before the commencement of bankruptcy proceedings is entitled to priority of payment. *Shropshire, Woodliff & Co.* v. *Bush*, U. S. Sup. Ct., Jan. 7, 1907.

This is the first decision of the Supreme Court on this matter. It is clear that if the assignment had occurred after the commencement of the bankruptcy proceedings the assignee would be entitled to priority. *In re Campbell*, 102 Fed. Rep. 686. The present decision, however, must rest on the ground that the priority is attached to the debt and not to the person of the wage-earner, the statute merely describing the nature of the debt given priority. Courts reaching a different result have followed the precise language of the statute, holding that the wages must be "due to workmen, clerks and servants" when the bankruptcy occurred, if priority is to be allowed. *In re Westland*, 99 Fed. Rep. 399. This practically deprived the wage-earner of the assignability of his claim, a valuable right. Thus, while professing to construe the statute to protect him, the courts defeated their purpose. See *In re Harmon*, 128 Fed. Rep. 170. The principal case arrives at a more desirable construction of the clause,

more in accord with its spirit and not doing violence to its language. Though the weight of lower court decisions was against this result, it is not without support. *In re Brown*, 4 Fed. Cas. 1974; *In re Harmon*, *supra*.

BANKRUPTCY — PROOF OF CLAIM — FILING OF PROOF. — *Held*, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is a filing within the Bankruptcy Act, except as regards personal claims of the trustee, which must be filed with the referee within the year. *J. B. Orcutt Co.* v. *Green*, U. S. Sup. Ct., Jan. 7, 1907.

The result reached by the court is practical and seems justified by § 30 of the Act and General Order 21.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — TITLE BEFORE APPOINTMENT OF TRUSTEE. — The federal Bankruptcy Act provides that the trustee of the estate of a bankrupt upon his qualification "shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt." In bankruptcy proceedings brought against him the plaintiff had failed to disclose any property, and no trustee was appointed. After his discharge he brought action in a state court for the value of services rendered prior to the bankruptcy proceedings. *Held*, that the plaintiff may maintain this action. *Rand* v. *Iowa Central R. R. Co.*, 78 N. E. Rep. 574 (N. Y.).

The view has been expressed that during the period between adjudication of bankruptcy and the appointment of a trustee the property is in the custody of the law. *Rand* v. *Sage*, 94 Minn. 344; see COLLIER, BANKRUPTCY, 5 ed., 553. In the absence of any formal taking charge of the property such a theory seems untenable. The better view is that until the appointment of a trustee title remains in the bankrupt, but on the happening of that event the statutory provision requires that the rights of all parties be settled as though title had been in the trustee since the adjudication. *Cf. Bank* v. *Sherman*, 101 U. S. 403; *Bryan* v. *Bernheimer*, 181 U. S. 188. Thus in the principal case, though the bankrupt apparently has at present a legal right to sue, payment to him by the debtor would not protect the latter against suit by a later appointed trustee. The defendant, then, should be given some protection. It is possible that the debtor could protect himself by securing the appointment of a trustee before paying the judgment. If he is unable immediately to secure this, the court should protect him against further liability either by the form given to the original judgment or by a temporary injunction. *Cf. Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664.

BROKERS — STOCKS CARRIED ON MARGIN — NATURE OF TRANSACTION. — A broker bought and sold stock on margin for the defendants. Within four months before his bankruptcy a balance was struck in the account, which showed that he held stock for the defendants of a certain value, and that the defendants were indebted to him to a less amount. This the defendants paid and received the stock. The broker's trustee in bankruptcy brought suit to recover the stock, on the ground that title to it was in the broker and that its return to the defendants was a preference. *Held*, that title to the stock was in the customers, and that the defendants were not creditors within the meaning of the Bankruptcy Act of 1898, c. 541, § 1 (9). *Richardson* v. *Shaw*, 147 Fed. Rep. 659 (C. C. A., Second Circ.).

For a discussion of the principles involved, see 19 HARV. L. REV. 529. *Cf.* also 7 *ibid.* 183; 15 *ibid.* 78.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH. — A New York man deserted his wife and purported to marry a New Jersey woman, who bore him two children. Thereafter he became domiciled with his family in Michigan, obtained a divorce there from his New York wife without personal service and by default, and went through a second marriage ceremony with the New Jersey woman. This divorce and remarriage a New York court by decree refused to recognize. By Michigan law illegitimate children become legitimate by the subsequent marriage of their parents.

The children claimed New York realty under a devise as the "lawful issue" of their father. *Held*, that they do not take. *Olmsted* v. *Olmsted*, 51 N. Y. Misc. 309. See NOTES, p. 400.

CONFLICT OF LAWS — MARRIAGE — JURISDICTION FOR NULLIFICATION. — A, an Englishwoman, was married in England to B, a domiciled Frenchman. This marriage was pronounced void by the French court, on the ground that B, who was not of full age by French law, had not obtained his parents' permission to marry. A then married C in England. C sought a decree of nullity on the ground that, as the French court had been without jurisdiction, A was still the wife of B. *Held*, that the marriage be annulled. *Ogden* v. *Ogden*, 23 T. L. R. 158 (Eng., P. D., Dec. 10, 1906).

A decree of annulment declaring, as it does, that no valid marriage ever existed, should be pronounced only by a court of the sovereign which purported to create the marriage. The difficulty lies in determining what is in fact such creating sovereign. The simplest view, and that prevalent in the United States, is that the jurisdiction where the ceremony was performed creates the marriage, and alone can annul. *Cummington* v. *Belchertown*, 149 Mass. 223. The English view, however, seems to be that if either party is domiciled in England that law alone applies; otherwise, the law of the husband's domicile at the time of the marriage. See *Johnson* v. *Cooke*, [1898] 2 Ir. 130; 13 HARV. L. REV. 604. This view often leads to the indefensible result that two countries are capable of creating and hence of annulling the marriage when the contracting parties are domiciled in different jurisdictions. See *Bater* v. *Bater*, 21 T. L. R. 517; DICEY, CONF. OF LAWS, 394. The illogical feature of the English view, in that it applies a peculiar rule to domiciled Englishmen, is brought out in the present case. The case is plainly right on the United States theory; indeed the language of the opinion is apparently based upon it. *Cf. Linke* v. *Van Aerde*, 10 T. L. R. 426; see DICEY, CONF. OF LAWS, 276, 277.

CONSTITUTIONAL LAW — CLASS LEGISLATION — STOCK TRANSFER TAX. — A New York statute imposed "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfer of shares or certificates of stock in any domestic or foreign . . . corporation . . . on each share of one hundred dollars of face value or fraction thereof," a tax of two cents. *Held*, that the tax is unconstitutional. *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8. See NOTES, p. 408.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTORY INDICTMENT IN ADJOINING COUNTY. — A statute provided that an indictment for lynching should be brought by the grand jury of a county adjoining that where the crime was committed. The defendant moved to quash such an indictment on the ground that the statute was unconstitutional. *Held*, that the statute is valid. *State* v. *Lewis*, 55 S. E. Rep. 600 (N. C.). See NOTES, p. 404.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CONTRACT BY STATE NOT TO DISCRIMINATE AGAINST FOREIGN CORPORATION. — A statute imposed a graduated entrance fee upon foreign corporations, and provided that they should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon" similar domestic corporations, and "have no other or greater power." The life of domestic corporations was twenty years. A foreign corporation paid the fee and entered the state. Three years thereafter the state imposed twice as heavy a license tax on foreign as on domestic corporations. *Held*, that this tax impairs the obligation of a contract by the state not to discriminate against the foreign corporation for twenty years. Four justices dissented. *Am. Smelting & Refining Co.* v. *Colorado*, U. S. Sup. Ct., Jan. 7, 1907. See NOTES, p. 405.

CONSTRUCTIVE TRUSTS — EFFECT OF STATUTE OF FRAUDS — EFFECT OF FRAUD. — A, shortly before his death wishing to give certain land to the plaintiff, a daughter, did what he and the defendant, another daughter, thought was

effective to pass the legal title to it to the latter, upon her oral promise to hold it in trust for the plaintiff. A died intestate, and it was then discovered that the title to the land had not passed out of him. The defendant, whose intentions throughout the entire transaction had been fraudulent, refused to recognize the trust as to her interest as heiress-at-law. The plaintiff filed a bill to compel her to recognize the trust. *Held*, that because of the defendant's fraud the Statute of Frauds has no application, and the plaintiff's prayer should be granted. *Crossman* v. *Keister*, 79 N. E. Rep. 58 (Ill.). See NOTES, p. 403.

CONTEMPT — NATURE OF PROCEEDINGS — DISOBEDIENCE BY BANKRUPT. — In contempt proceedings for failure to obey a court order to deliver property to trustees, a bankrupt declared that she had no property. *Held*, that such proceedings are criminal in nature and contempt must be proved beyond a reasonable doubt. *Moody* v. *Cole*, 148 Fed. Rep. 295 (Dist. Ct., Dist. Me.).

For a discussion of the principles involved, see 20 HARV. L. REV. 233.

CONTRACTS — DEFENSE OF IMPOSSIBILITY — FRAUDULENT CONCEALMENT BY PLAINTIFF. — The defendant contracted to sell the plaintiff coal from a designated colliery for shipment to Australia. The defendant had already contracted with the colliery for coal. Before either contract the colliery had agreed to sell for shipment to Australia to another dealer exclusively. This the plaintiff knew, but did not disclose to the defendant. On learning of the defendant's contract with the plaintiff, the colliery refused delivery, making the defendant's performance impossible. *Held*, that the plaintiff was guilty of fraudulent concealment and that the defendant is entitled to rescind. *Scott, Fell & Co.* v. *Lloyd*, 6 S. R. (N. S. W.) 447.

The reasoning of the decision goes beyond the present state of the authorities. Ordinarily, where means of information are within the reach of both, one of the contractors is not bound to disclose to the other facts which if known would influence his action. The rule is based largely on the difficulty in the application of a contrary one. See *Laidlaw* v. *Organ*, 2 Wheat. (U. S.) 178; but *cf. Barwick* v. *Eng., etc., Bank*, L. R. 2 Exch. 259. Aside from cases of fiduciary relations, the giving of a defense in exceptional circumstances seems to be governed by the court's sense of fairness rather than by any well-defined rule. See *Dambmann* v. *Schulting*, 75 N. Y. 55. An intention to reap self-benefit will not alone create a duty of disclosure. *Neill* v. *Shamburg*, 158 Pa. St. 263. Recent cases have distinguished suppression of a fact when inquiry is made from mere silence, giving a defense in the former case. *Turner* v. *Green*, [1895] 2 Ch. 205. The court seems justified, however, in making in the present case an additional exception to the general rule. For where, as here, one person induces another to contract with him, not disclosing his private knowledge of facts which will probably make performance an impossibility, and it subsequently becomes so, he should be without remedy for the non-performance. *Cunningham* v. *Dunn*, 3 C. P. D. 443.

CORPORATIONS — CORPORATIONS DE FACTO — SALE OF STOCK. — The plaintiff purchased stock in the defendant corporation, relying on an incorrect statement by its secretary that it had been legally incorporated. *Held*, that the plaintiff is entitled in equity to a rescission of the sale. *Maine* v. *Midland Investment Co.*, 109 N. W. Rep. 801 (Ia.).

This case appears to be inconsistent with a somewhat similar case in the same jurisdiction which was discussed in 20 HARV. L. REV. 327.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — LIABILITY FOR ACTS OF NEW CORPORATION FORMED BY MEMBERS OF OLD. — The plaintiff was injured through negligent construction work alleged to have been sublet by the defendant corporation to the Atlantic Co., a corporation without capital formed by the members of the defendant corporation. The consideration was to be one-half per cent above the actual cost of the work. The object of the whole transaction was confessedly to avoid attachments. The jury were instructed that if the subletting was not *bona fide*, but

fictitious, in order to relieve the defendant from ordinary legal liabilities, and the defendant was really controlling the work, the verdict should be for the plaintiff. *Held*, that these instructions correctly submitted the question to the jury. *Holbrook, etc., Corp.* v. *Perkins*, 147 Fed. Rep. 166 (C. C. A., First Circ.).

Reference was recently here made to decisions sometimes, though erroneously, as it was contended, supposed to involve a disregard of the corporate entity. See 20 HARV. L. REV. 223. The point taken seems neatly illustrated by the present case; for the court, although quoting a statement that the corporate entity might sometimes be disregarded, finally placed its decision upon the valid ground that "the arrangement . . . was merely a piece of circumvention which may be regarded either as a nullity or as making the Atlantic Construction Co. the agent or *alter ego* for whose acts the defendant as true principal is liable." That the result does not hinge upon an analysis of the component members of the corporate entity seems clear; for if, for example, in the present case a corporation composed of other individuals, or a man of straw, were substituted for the Atlantic Co., the result would certainly be unchanged. See *McNeil, etc., Co.* v. *Crucible, etc., Co.*, 207 Pa. St. 493. The inference, then, is natural that the only force of the identity of the members of the two corporations is as evidence that the independent contractor agreement was merely colorable.

CORPORATIONS — STOCKHOLDERS' INDIVIDUAL LIABILITY TO CORPORATION AND CREDITORS — LIABILITY ON UNPAID STOCK SUBSCRIPTIONS. — A statute provided that where stock was issued below par the stockholder was bound to pay the sum necessary to complete the par value if required to satisfy the debts of the company. A took stock in a corporation at a value below par, on the agreement that he was subject to no further liability thereon. B, who participated in this transaction as a stockholder, later became a creditor of the corporation. The corporation became insolvent. *Held*, that B may recover from A the difference between what A paid for his stock and its par value. *Easton Nat'l Bank* v. *Am. Brick and Tile Co.*, 64 Atl. Rep. 917 (N. J., Ct. Err. and App.). See NOTES, p. 401.

CORPORATIONS — STOCKHOLDERS' RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF PREËMPTION. — The majority stockholders of the defendant corporation voted to double the capital stock and to sell all the shares to an outsider at $450 a share — four and one-half times their par value. The plaintiff, a dissenting stockholder, was refused an opportunity to purchase the same proportion of the new stock that he held of the old stock. *Held*, that the plaintiff may recover from the corporation the difference between the fixed selling price and the market value on the day of the sale of his proportionate share of the new stock. *Stokes* v. *Continental, etc., Co.*, 36 N. Y. L. J. 589 (N. Y., Ct. App., Nov. 13, 1906). See NOTES, p. 398.

CRIMINAL LAW — SENTENCE — REMANDING FOR NEW SENTENCE. — On an indictment for murder the defendant was found guilty of manslaughter. Upon a new trial granted on appeal he was found guilty of murder, and was sentenced to a longer imprisonment than could be imposed in the case of manslaughter. The defendant appealed. *Held*, that the case be remanded with directions to sentence for manslaughter. *People* v. *Farrell*, 109 N. W. Rep. 440 (Mich.).

In Michigan such a second verdict for murder is within the rule against double jeopardy. See *People* v. *Knapp*, 26 Mich. 112; 19 HARV. L. REV. 300. Therefore it is void unless it may be construed as a verdict for manslaughter. Since upon an indictment for murder manslaughter may be found, on the ground that the allegation of the greater crime includes the less, therefore a verdict for murder should amount to a finding of manslaughter when there can be no conviction for murder. A verdict naming the first degree of a crime has been held to be a finding of guilt in the second degree. *Simpson* v. *State*, 56 Ark. 8. The remaining difficulty of the length of the sentence might be remedied by holding the excess void under statute. MICH. COMP. L. § 11984; see *People*

v. *Town*, 53 Mich. 488. But since the sentence was given for the wrong crime, it is more just to remand the case to the lower court, that it may exercise its discretion in sentencing for manslaughter. Power so to remand after sentence illegal in length, terms, or procedure, is recognized by more modern authority. *McCormick* v. *State*, 99 N. W. Rep. 237 (Neb.); see 9 HARV. L. REV. 220. This doctrine seems equally applicable when the sentence is illegal upon another ground. *Cf. Simpson* v. *State*, *supra*.

CRIMINAL LAW — UNCLASSIFIED CRIMES — ATTEMPT FRAUDULENTLY TO SECURE PARDON. — A solicitor was convicted of larceny and disbarred. To secure his pardon and reinstatement he forged and sent to the authorities documents representing that he was innocent. The fraud was discovered before pardon was granted or a judicial inquiry begun. *Held*, that this attempt to pervert justice is a misdemeanor. *Rex* v. *White*, 6 S. R. (N. S. W.) 398.

A conspiracy to pervert justice would be indictable. See 1 HAWK. P. C., 8 ed., 444; *People* v. *Falck*, 125 N. Y. 324. But the defendant in the present case acted singly. His offense was an attempt to mislead a judicial inquiry and by improper means to have a proper conviction set aside. On the one hand this would be an interference with a tribunal administering public justice and on the other an interference with a judicial decision. Cases involving these offenses are rare, and text-writers mention them only incidentally. See 2 BISHOP, CRIM. LAW, 8 ed., §§ 86, 1029. But it has been held that an arbitration board sanctioned by courts of law is a tribunal administering public justice, and that an attempt to mislead it is a misdemeanor. *Regina* v. *Vreones*, [1891] 1 Q. B. 360. When clearly interfering with the administration of public justice, such offenses as the present should be misdemeanors at common law, for the state guards the administration of justice, and interference with state functions constitutes a misdemeanor. *Regina* v. *Bunting*, 7 Ont. 524; *Com.* v. *Silsbee*, 9 Mass. 416. As the completed act would be a misdemeanor, so also is the attempt. *Regina* v. *Chapman*, 2 C. & K. 846.

DAMAGES — CONSEQUENTIAL DAMAGES — LIABILITY FOR GRATUITOUS NURSING. — In an action to recover damages for personal injuries the plaintiff offered evidence of the value of his wife's nursing, although she could not recover against him for such services. *Held*, that the evidence is competent. *Indianapolis & E. Ry. Co.* v. *Bennett*, 79 N. E. Rep. 389 (Ind., App. Ct.).

It has been held that the value of services for which the plaintiff is not legally liable cannot be recovered. *Goodhart* v. *Pennsylvania Ry. Co.*, 177 Pa. St. 1. This result is based upon the theory that only the pecuniary loss may be recovered when damages are merely compensatory. See *Drinkwater* v. *Dinsmore*, 80 N. Y. 390. But on the contrary, where an injured party received gratuitous medical treatment as a member of the profession he was allowed to recover its value. *City of Indianapolis* v. *Gaston*, 58 Ind. 224. And it is well settled that the receipt of insurance cannot be proved to mitigate damages. *Harding* v. *Town of Townsend*, 43 Vt. 536. This last case is put on the ground that, as between the plaintiff and defendant, the insurance is *res inter alios acta*. See *Chicago, etc., Co.* v. *Pullman, etc., Co.*, 139 U. S. 79. Upon this ground the decisions next above cited as well as the present case seem correct. And the weight of authority is in accord. *Kaiser* v. *St. Louis Transit Co.*, 108 Mo. App. 708. The defendant is liable for the pecuniary equivalent of all injuries suffered, not merely for expenses actually incurred. The need of medical services is admitted to be a consequential damage for which the defendant should compensate the plaintiff, and a gift of such services by a third party cannot alter this liability.

DAMAGES — MEASURE OF DAMAGES — SUBJACENT SUPPORT OF HIGHWAY. — The defendants by removing minerals from beneath the surface caused a road and the land adjoining to sink a few feet. The defendants contended that their liability was limited to the cost of making an equally commodious road at the lower level. *Held*, that the defendants are liable for the reasonable cost of rebuilding the road to its former level. *Mayor, etc., of Wednesbury* v. *Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

In the case of a private way the right of the owner is to traverse the surface without having it obstructed. While a precipitous subsidence may well amount to an obstruction, a uniform subsidence in general would not. It is believed that the owner has his full rights so long as he is able, with no material increase in difficulty, to travel the line upon the surface which marks his way. His right should not extend to the maintenance of any particular level. A public road, however, is different. It is established by law in a certain place, and any interference with it which changes its level without lawful authority is *per se* a nuisance. *Milburn* v. *Fowler*, 27 Hun (N. Y.) 568; *Benfieldside Board* v. *Consett Iron Co.*, 3 Ex. D. 54. An abutting owner has been allowed to compel its restoration if it is unlawfully changed. *Finegan* v. *Eckerson*, 26 N. Y. Misc. 574. On the other hand he cannot complain of its restoration by those who lawfully control it. *Atherton* v. *Cheshire County Council*, 60 J. P. 6. Since, therefore, the public has a right to a particular level for the road, any one who displaces it should be liable for its restoration.

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — TWO INDEPENDENT CAUSES OF ACTION. — A statute gave personal representatives power to prosecute any personal actions their decedent might have prosecuted had he survived, except those for slander. Another statute gave certain surviving relatives the right of action for the death of their decedent occasioned through the wrongful act of others. Under the former statute damages were claimed by the administrator of the deceased, whose death had followed within a few hours after injury by the defendant. *Held*, that the plaintiff is not prevented from recovering because the relatives of the deceased have an independent cause of action for his death. *Stewart* v. *United Electric Light & Power Co.*, 65 Atl. Rep. 49 (Md.).

This case adopts the preferable view, which is supported by the weight of authority. For a discussion of the question see 15 HARV. L. REV. 854.

DISCOVERY — NATURE AND SCOPE OF PROCEEDING — BILL AGAINST ONE NOT PARTY TO RECORD. — The defendant in an action for freight brought a counterclaim for damage to the goods caused by the plaintiff's negligence. The defendant had been indemnified by the shipper for the loss and was advancing the counterclaim on behalf of the latter. The plaintiff asked for a discovery, in a matter concerning the counterclaim, from the shipper, a foreign company, as the real party in interest. *Held*, that the real party in interest make discovery or in default thereof all further proceedings on the counterclaim be stayed. *Compania Naviera Vascongada* v. *Hall*, 40 Ir. L. T. 246 (Ir., K. B., Nov. 8, 1906).

It is usually said that a discovery can be had only from a party to the record of the principal suit, and many English cases affirm this doctrine. *Fenton* v. *Hughes*, 7 Ves. 287; *Queen of Portugal* v. *Glyn*, 7 Cl. & F. 466. An early case, however, held that a real party in interest, though not on the record, might be subjected to a discovery. *Plummer* v. *May*, 1 Ves. 426. Its doctrine seems to be sanctioned by a later case, which the present one follows. *Willis* v. *Baddeley*, [1892] 2 Q. B. 324. However, in both the present decision and that which it purports to follow, the nominal plaintiff had no independent interest whatever; moreover, the relief in both cases took the indirect form of an injunction against the nominal plaintiff, conditional upon a discovery by the real plaintiff. The decision at hand goes further than the other in that there the nominal plaintiff was avowedly the mere agent of the real party in interest. In another late case, where the plaintiff on the record retained a one-fourth interest, though the conduct of the proceedings had been handed over to the party mainly interested, the bill against the latter was denied. *Nelson & Sons* v. *Nelson*, 95 L. T. R. 180 (Eng., C. A., June 12, 1906).

DOMICILE — HUSBAND AND WIFE — INDEPENDENT DOMICILE OF WIFE AFTER HUSBAND'S INSANITY. — The appellee instituted the present action to enjoin the prosecution of a claim for taxes. The appellee was a widow whose husband had been during the years for which the assessment was made an inmate of an insane asylum within the appellant's county. She and her husband had

been domiciled in the county prior to the husband's insanity, but subsequently thereto, but prior to the accrual of the tax in question, the appellee had established an actual and permanent residence in another jurisdiction. *Held*, that a wife is capable under these circumstances of establishing a separate domicile. *McKnight* v. *Dudley*, 148 Fed. Rep. 204 (C. C. A., Sixth Circ.).

The question involved, apparently a novel one, is decided in accordance with manifest justice. It is, moreover, supported indirectly by several lines of decisions. An insane person is incapable of changing his domicile. *McClerry* v. *Matson*, 2 Ind. 79. And it has been said that a husband's insanity should give the wife as complete rights as in case the husband were *civiliter mortuus*. See *Gustin* v. *Carpenter*, 51 Vt. 583. That desertion or cruelty will give the wife capacity to acquire an independent domicile for purposes of divorce is the doctrine of numerous decisions, and in a few cases the doctrine is applied for other purposes. *Watertown* v. *Greaves*, 112 Fed. Rep. 183 (C. C. A., First Circ.). In emphasizing, as a ground for its decision, the statutory enlargement of a wife's independent capacity, the court follows a somewhat anomalous doctrine advanced in New York and New Hampshire that the wife's emancipation from other disabilities relieves her also from dependence upon her husband's choice of domicile. *Matter of Florance*, 54 Hun (N. Y.) 328; *Shute* v. *Sargent*, 67 N. H. 305. Since in the present case the husband was no longer capable of choosing the matrimonial home, or of dominating the matrimonial status, there could be no better case for the application of the Supreme Court's dictum that "a wife may acquire a separate domicile whenever it is necessary or proper that she should do so." See *Cheever* v. *Wilson*, 9 Wall. (U. S.) 108, 124.

DOWER — RIGHTS OF WIDOW WHEN HUSBAND HAS SOLD LAND WITHOUT HER CONSENT. — The petitioner's husband during coverture sold part of his real estate without her consent. After his death she sought to have the value of her dower in the sold land set apart out of his remaining estate. *Held*, that the judgment sustaining the demurrer to the complaint be affirmed. *In re Park's Estate*, 87 Pac. Rep. 900 (Utah). See NOTES, p. 407.

EJECTMENT — DISSEISIN REQUISITE TO MAINTAIN ACTION — ENCROACHMENTS ABOVE SURFACE. — A telephone company without authority strung a wire over the plaintiff's land between posts neither of which touched the plaintiff's land. *Held*, that ejectment lies to compel the removal of the wire. *Butler* v. *The Frontier Telephone Co.*, 186 N. Y. 486.

For a discussion of this subject, suggested by the same case in the lower court, see 19 HARV. L. REV. 363.

EXECUTORS AND ADMINISTRATORS — PROCEEDINGS BY OR AGAINST — POWERS BEFORE ISSUE OF LETTERS. — In an action of replevin for seizing certain cattle claimed by the appellee, the appellant justified as the agent of the widow of the mortgagee of the cattle. The mortgage was due and unpaid. Letters of administration were granted to the widow after the commencement of this action. The court charged that if at the time when the property was taken there was no administration in the mortgagee's estate, the verdict should be for the plaintiff. *Held*, that the charge was correct. *James* v. *Nunley*, 97 S. W. Rep. 1028 (Ind. Ter.).

The appellant's principal when suit was begun was executrix *de son tort*. *Padget* v. *Priest*, 2 T. R. 97. Even had she not later received letters of administration, it is an open question whether she would have been liable here. And there is some authority to the effect that the appellant, being only an agent and apparently not intending to assume any of the ordinary duties of an executor, should not have been liable. *Givens* v. *Higgins*, 4 McCord (S. C.) 286. But the facts of this case afford a stronger reason for disagreeing with the decision. The seizure would admittedly have been valid if made by a *de jure* administratrix, which the widow later became. Thereupon her right related back to the death of the intestate, and with a few exceptions, here unimportant, her previous acts as executrix *de son tort* would be validated. See *McClure* v. *People*, 19 Ill. App. 105. The appellee should still be barred from

a recovery against her, although her appointment came after the suit was begun or judgment obtained. *Shillaber* v. *Wyman*, 15 Mass. 322; *Olmsted* v. *Clark*, 30 Conn. 108. Nor should her agent be liable if her act of seizure became validated. *Magner* v. *Ryan*, 19 Mo. 196.

FEDERAL COURTS — RELATION OF STATE AND FEDERAL COURTS — SUBSEQUENT JURISDICTION OF STATE COURT AFTER REMOVAL IN PRIOR ACTION. — The plaintiff discontinued an action which had been removed from a state court to a federal court on the petition of the defendant. Subsequently the plaintiff brought a new action for the same cause in a state court for an amount too small to permit removal to a federal court. *Held*, that the state court has jurisdiction. *Young* v. *Bell Tel. & Tel. Co.*, 75 S. C. 326.

It is necessary that the federal courts should have exclusive jurisdiction over a pending suit after its removal from the state courts in order to obviate the possibility of conflicting orders, decrees or judgment. This necessity, however, disappears when the action is dismissed, and consequently the jurisdiction of the federal court need not exclude subsequent actions in the state courts, though based on the same cause. This view has prevailed, and the present case is now settled law. *Gassman* v. *Jarvis*, 100 Fed. Rep. 146; *Texas, etc., Co.* v. *Starnes*, 128 Fed. Rep. 183; aff. 133 Fed. Rep. 1022. An objection to the decision, however, is that it permits the plaintiff to allow a dismissal in the federal court for the purpose of having the cause decided by a state court. See further 17 HARV. L. REV. 574.

FORGERY — CRIMINAL LIABILITY OF PARTNER FOR DEFRAUDING PARTNERS. — A partner was advanced a percentage on all advertising he secured for a program printed by the partnership. He was prosecuted for forgery for presenting spurious advertising contracts in order to receive his advance. *Held*, that he is not criminally liable. *State* v. *Pope*, 4 Oh. L. Rep. 532. (Oh., Hamilton Co. C. P., Nov., 1906).

The court argues that since a partner cannot be convicted of larceny or embezzlement of partnership property, by analogy he should not be criminally liable for obtaining partnership funds by forgery. The latter offense, however, does not involve the taking of another's property which is necessary in larceny or embezzlement. Forgery is defined as the false making or materially altering with intent to defraud of any writing which if genuine might apparently be of legal efficacy or the foundation of a legal liability. 2 BISHOP, CRIM. LAW, § 523. It might be argued that a partner can neither defraud nor have an intent to defraud the partnership, as that involves the idea of defrauding himself. Nevertheless it is recognized that he may be liable for defrauding his co-partners in a partnership transaction. *Patterson* v. *Hare*, 4 N. Y. App. Div. 319; *The Queen* v. *Warburton*, L. R. 1 C. C. 274. And so here the intent to defraud is found in the attempt to deprive the co-partners by deception of their interest in the partnership funds to be advanced on the contracts. Therefore the failure to convict seems an unnecessary miscarriage of justice. This conclusion is supported by authority. *Regina* v. *Smith*, 9 Cox C. C. 162; *Regina* v. *Moody*, 9 Cox C. C. 166; *contra*, *Com.* v. *Brown*, 10 Phila. (Pa.) 184.

GAMING — MECHANICAL DEVICES — CHANCE OF LOSS. — A saloon-keeper maintained on his premises a slot-machine, from which on every deposit of a nickel a check would issue of the face value of five cents or more. These checks were redeemable only in trade. The saloon-keeper arranged the checks in the machine and so knew their total amount. *Held*, that such a device constitutes gambling within the meaning of the Liquor Tax Law. *Matter of Cullinan*, 114 N. Y. App. Div. 654.

This case expressly overrules a previous New York decision holding that such a device is not gambling. *Cullinan* v. *Hosmer*, 100 N. Y. App. Div. 148. The fact that the customer cannot lose, which was the decisive point in the last-named case, is held to be immaterial. The cases cited to support the present decision are distinguishable. The statutes on which three of them rest

forbid the distribution of money by chance, whereas the Liquor Tax Law merely prohibits gambling on the premises. *Cf. Public Clearing House* v. *Coyne*, 194 U. S. 497; *Hudelson* v. *State*, 94 Ind. 426; *Lang* v. *Merwin*, 99 Me. 486. The New York case cited, where money prizes were distributed according to chance, was decided under a code section which provides for just such a transaction and is therefore not in point. *Cf. People ex rel. Ellison* v. *Savin*, 179 N. Y. 164; see N. Y. PENAL CODE § 323. The device in the principal case is clearly one of chance. It may well be doubted, however, whether it is a gambling device, for to constitute gambling there should be a mutual chance of loss and gain between the parties. This is the doctrine of numerous decisions. *Jordan* v. *Kent*, 44 How. Prac. (N. Y.) 206; *State* v. *Grimes*, 49 Minn. 443; see BOUVIER, LAW DICT.

INSANE PERSONS — CONVEYANCES — HOW AVOIDED. — In an action of ejectment the defendants claimed title under a deed from the plaintiffs' ancestor to a *bona fide* purchaser. The plaintiffs offered evidence to show that the grantor was insane when he made the deed. *Held*, that the evidence is inadmissible, as the deed must be regarded as valid until declared invalid by a court of equity. *Smith* v. *Ryan*, 36 N. Y. L. J. 1071 (N. Y., App. Div., Dec., 1906).

In jurisdictions which regard the deeds of insane persons as void, ejectment lies. *Farley* v. *Parker*, 6 Ore. 105. By the weight of authority, however, they are held merely voidable, analogously to the deeds of infants. See 17 HARV. L. REV. 575. But while an infant may avoid against a *bona fide* purchaser without a return of the consideration, this is generally not allowed an insane grantor. *Coburn* v. *Raymond*, 76 Conn. 484; *contra*, *Hovey* v. *Hobson*, 53 Me. 451. In the case of an infant an equitable action to avoid is not required. *Birch* v. *Linton*, 78 Va. 584. And the difference noted between the rules regarding infants and insane persons does not seem sufficient to make the aid of equity necessary here. It is true that in the case of the infant the bringing of the suit is a sufficient avoidance, while in the case of an insane person the mere act of disaffirmance is not always enough, as the repayment of the consideration may be an additional condition precedent to recovery. But if it can be shown that this condition has been fulfilled or that the plaintiff stands ready to pay the money into court, ejectment might well be allowed. *Eaton* v. *Eaton*, 37 N. J. L. 108.

INTERSTATE COMMERCE — CONTROL BY STATES — RAILWAY REPORTS TO STATE COMMISSION. — *Mandamus* was sought against a non-resident railway corporation doing business within the state, commanding it to report to the state railroad and warehouse commission a full and true statement of the affairs of the company, as required by the state act of 1871. The federal interstate commerce statute of 1887 requires a similar report to the Interstate Commerce Commission. *Held*, that as the state and federal laws are substantially identical and the requirement is not a burden on interstate commerce, the writ of *mandamus* be awarded. *People* v. *Chicago I. & L. Ry. Co.*, 79 N. E. Rep. 144 (Ill.).

The state demanded these reports for the purposes of the state railroad commission. The creation and functions of these commissions have been held repeatedly to be a valid exercise of police power. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556, 571. As one of the functions of the commission is to recommend legislation affecting domestic commerce, it needs as a basis the reports of both intra-state and interstate railway corporations doing business within the state. In the absence of federal legislation the state could properly require these reports to be made even though affecting the acts of a carrier of interstate commerce. *Cooley* v. *Board of Wardens*, 12 How. (U. S.) 299. It might well be argued that the existence in the present case of similar federal legislation is immaterial, on the ground that the state requirement does not affect interstate commerce. *R. R. Co.* v. *Fuller*, 17 Wall. (U. S.) 560. But granting that there is an indirect effect, the existence of the federal statute in the present case does not invalidate the state statute, for the statutes are not conflicting. And

though they are similar, the purposes are different. The state statute consequently is not superseded. *Cf. Mo., etc., Ry. Co.* v. *Haber*, 169 U. S. 613.

INTERSTATE COMMERCE — CONTROL BY STATES — REQUIREMENT THAT BAGGAGE BE TRACED THROUGH CONNECTING CARRIERS. — A state statute provided that even though when shipping through freight over connecting lines a railway contracted for liability only on its own line, yet it should be liable for damage occurring anywhere unless it gave information as to the responsible person or proved that it could not with reasonable diligence do so. *Held*, that the statute is not an unconstitutional regulation of interstate commerce. *Skipper* v. *Seaboard Air Line Ry.*, 55 S. E. Rep. 454 (S. C.).

A state may forbid any limitation by contract of the common law liability of an interstate carrier for damage to freight. *Chicago, etc., Ry. Co.* v. *Solan*, 169 U. S. 133; see 11 HARV. L. REV. 544. But to enforce greater obligations to carry, so that an interstate carrier must be responsible for a through shipment over a connecting line, is a regulation of commerce held to be beyond the state's power. *Central of Ga. Ry. Co.* v. *Murphey*, 196 U. S. 194. Merely as a rule of evidence, however, a state law may provide that the taking of goods for such through shipment shall imply *prima facie* a contract of responsibility for the whole distance. *Mo., etc., Ry. Co.* v. *McCann*, 174 U. S. 580. But the first carrier cannot be put to the alternative of informing shippers as to those who caused any damage or of assuming, irrespective of its actual agreement, the responsibilities of a through contract. *Central of Ga. Ry. Co.* v. *Murphey*, *supra*. True, in the present case the responsibility may be avoided by showing due diligence in seeking the information. Even so the statute does not seem so reasonable a local measure that, as in the case of the rule of evidence, the subject involved should be open to state control rather than be maintained *in statu quo* until Congress shall act.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — DUMPOR'S CASE. — The plaintiffs conveyed land to a railroad company on condition that if the land ceased to be used for railroad purposes it should revert to the grantors. A grantee of the railroad mortgaged the land to the defendant, without the plaintiffs' knowledge, and later gave a second mortgage deed of the same land, on which the plaintiffs endorsed that, to the extent of such mortgage, they waived "any right of reversion under the condition" in the original deed. *Held*, that the waiver of the condition as to the second mortgage does not determine the condition as to the first mortgage. *Moss* v. *Chappell*, 54 S. E. Rep. 968 (Ga.).

Although this decision is sound, the court seems to have erred in assuming the case to be within the rule in Dumpor's Case, in which it was held that, in case of a lease, the waiver of a condition not to assign, given in favour of the original lessee, operated as a complete destruction of the condition. *Dumpor's Case*, 4 Coke 119*b*; see 12 HARV. L. REV. 272. This doctrine has been much limited. It has been restricted entirely to conditions against assignments of leases, even to the exclusion of sub-leases. *Doe* v. *Bliss*, 4 Taunt. 735. This alone is sufficient to remove the present case from its operation. But there is still another objection to its application. The decision in Dumpor's Case that a waiver given as to one breach operates as a waiver of all breaches by no means, it is believed, involves the doctrine that a waiver of all breaches for a specific purpose, such as in the present case the protection of a certain mortgagee, destroys the condition as to all purposes. The effect of the waiver in the present case was merely to make the plaintiff's potential right of entry part of the security in the second mortgage. That clearly does not make it security for the first mortgagee.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — WHAT CONSTITUTES WRITTEN CONTRACT. — The plaintiff made an offer in writing to a bilateral contract which the defendant, it seems, accepted orally. The Statute of Limitations barred actions on written contracts after ten years; on oral contracts after five years. *Held*, that the plaintiff's right of action is not barred until after ten years. *Bauer* v. *Hindley*, 222 Ill. 319.

To constitute a written contract the parties and terms must be distinctly specified in writing. *Grafton* v. *Cummings*, 99 U. S. 100. But where a written contract is required by the Statute of Limitations, it is not essential that the writing be signed by all the parties or even by the party to be charged. *Memory* v. *Niepert*, 131 Ill. 623; *Midland Co.* v. *Fisher*, 125 Ind. 19. It must, however, purport to be the statement of a completed contract; a recital of the terms in a writing not intended as the expression of the agreement is insufficient. *Wood* v. *Williams*, 142 Ill. 269. An offer in writing contemplating acceptance by counter-promise obviously neither states nor purports to state the terms of a completed contract, and in the absence of further writing, an agreement based thereon is not a written contract. *Board of Education* v. *Foley*, 88 Ill. App. 470; *Hulbert* v. *Atherton*, 59 Ia. 91. But in case the offer contemplates a unilateral contract, no further writing is required to constitute a written contract. *Plumb* v. *Campbell*, 129 Ill. 101. The probable explanation of this distinction, apparently disregarded in the present case, is that no other promise than that contained in the offer is necessary to complete a unilateral contract, and hence the offer is the only essential element in the transaction that can be put in writing.

LIMITATION OF ACTIONS — NEW PROMISE AND PART PAYMENT — EFFECT ON BARRED JUDGMENT. — After the Statute of Limitations had run on a judgment, the judgment debtor gave the assignee of the judgment a mortgage to secure its payment containing a written promise to pay. *Held*, that the judgment is enforcible. *Spilde* v. *Johnson*, 109 N. W. Rep. 1023 (Ia.).

After the Statute of Limitations had run on a judgment, the judgment debtor made part payment. In an action on the judgment the debtor pleaded the Statute of Limitations. *Held*, that the action on the judgment is barred. *Olson* v. *Dahl*, 109 N. W. Rep. 1001 (Minn.).

The rule that acknowledgment or part payment revives an action on which the Statute of Limitations has run is by general consent, for some reason not clear, applied only in the case of contracts. See WOOD, LIMITATIONS, § 66. Whether a judgment is a contract is the subject of much difference of opinion. Text-writers in classifying contracts are accustomed to speak of judgments as contracts of record. See 1 STORY, CONTRACTS, 2. And a judgment has been held to be an implied contract within the meaning of a statute. *Gutta Percha Co.* v. *Mayor*, 108 N. Y. 276. It is not, however, a true contract; at most it is an obligation "implied in law," — the so-called quasi-contract. And it is generally held that the term "contract" includes only obligations based on the consent of the parties, and not those that are quasi-contractual. *State of Louisiana* v. *New Orleans*, 109 U. S. 285. Accordingly a judgment as such is not given the protection of the constitutional inhibition against the impairment of contractual obligations by the states, such protection being granted only to judgments based on contracts. *Nelson* v. *St. Martin's Parish*, 111 U. S. 716. The weight of divided authority, in agreement with the Minnesota case under consideration, favors the suggested conclusion that a judgment should not be considered a contract. *McAleer* v. *Clay County*, 38 Fed. Rep. 707; *contra*, *Frisbie* v. *Seaman*, 49 Ia. 95; see 1 BLACK, JUDGMENTS, §§ 7, 8, 10.

MUNICIPAL CORPORATIONS — CONTRACTS — PATENTED ARTICLES. — A statute required that certain contracts for public improvements be let to the lowest responsible bidder. An ordinance prescribed the use of a certain patented commodity in the construction of a municipal improvement. The patentee had agreed to furnish the commodity at a stipulated price to the contractor whose bid should be accepted. *Held*, that the ordinance is void as in violation of the statute. *Siegel* v. *City of Chicago*, 79 N. E. Rep. 280 (Ill.).

For a discussion of the principles involved, see 19 HARV. L. REV. 138.

QUIETING TITLE — REMOVAL OF CLOUD FROM PERSONAL PROPERTY. — The defendant made verbal claims to personal property possessed and owned by the plaintiff, whereby its market value was greatly diminished. *Held*, that a bill to remove cloud on title does not lie. *Red, etc., Co.* v. *Steideman*, 97 S. W. Rep. 220 (Mo., St. Louis Ct. App.).

This decision seems undoubtedly correct; for as verbal claims have almost uniformly been held to raise no cloud on realty, no more should they have that effect on personalty. See *Parker* v. *Shannon*, 121 Ill. 452; but see *Moran & Co.* v. *Palmer*, 36 Wash. 684. Moreover, the rule, supported by the weight of opinion (mostly dicta), that a bill to quiet the title of personal property never lies, has previously appeared to prevail in Missouri. See *State ex rel. Kenamore* v. *Wood*, 155 Mo. 425, 446. In the present case, however, a dictum recognizes "exceptions to this rule" which, unless wholly unreasoned and anomalous, seem to lead towards the opposite view that such a bill would lie in the case of personalty under the same circumstances as in the case of realty. See *Stebbins* v. *Perry County*, 167 Ill. 567. The issue between these two doctrines is simply one of policy. For the one, argument may be made that in the eye of the common law personalty has always been of less importance than realty; that usually adverse claims do not so much impair the value of personalty as of realty; and that this somewhat extraordinary remedy might be invoked in too many petty controversies. Supporting the other are the considerations that the elimination of verbal claims largely nullifies the force of the above suggestions; and that if equity does not provide this remedy, a situation often causing substantial injury will be without relief.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — LICENSE CONTRACTS UNDER PATENTS. — In order to control the market, various threshing-machine manufacturers had transferred their patent rights to the complainant, who acquired in this or other ways practically all patents affecting one branch of the business. The complainant then entered into uniform contracts with all the manufacturers, licensing them to use these patents, and stipulating among other things that they should maintain a uniform price for the completed machines. The complainant sought to enforce one of these contracts against the defendant manufacturer, who had cut prices. *Held*, that the contract is in restraint of trade and in violation of the Anti-Trust Act of July 2, 1890. *Indiana Mfg. Co.* v. *J. I. Case Threshing Machine Co.*, 148 Fed. Rep. 21 (Circ. Ct., E. D. Wis.).

For a discussion of the principles involved, see 19 HARV. L. REV. 125.

SALES — FACTORS' ACT — LARCENY BY AGENT. — A broker falsely represented to the plaintiff that he had certain named prospective customers. The plaintiff thereupon gave him possession of the goods with power to sell them to either of the proposed customers. The broker sold the goods to the defendant, a purchaser without notice. The jury found that the broker had committed larceny by trick. *Held*, that, under the Factors' Act of 1889, the defendant got good title. *Oppenheimer* v. *Frazer & Wyatt*, 51 Sol. J. 131 (Eng., K. B. D., Dec. 15, 1906).

The Factors' Act provides that where a mercantile agent is, with the consent of the owner, in possession of goods, a sale to a *bona fide* purchaser shall be valid. 52 & 53 VICT., c. 45, § 2. That the seller secured possession by fraud would not impair the validity of the purchaser's title, provided the owner gave him possession as a "mercantile agent," or, in the language of the earlier statutes, provided he was an "agent intrusted." *Baines* v. *Swainson*, 4 B. & S. 270. But if one obtains mere possession without being intrusted as mercantile agent, he can convey no title by virtue of the Factors' Act. *Kingsford* v. *Merry*, 1 H. & N. 503. There are dicta that if there is fraud amounting to larceny by trick no title can pass. See *Cahn* v. *Pockett's Co.*, [1899] 1 Q. B. 643, 659. But these dicta are inaccurate, for it is not because of fraud and larceny that the Act may not apply, but because there may be no intrusting as agent. *Cf. Cole* v. *N. W. Bank*, L. R. 10 C. P. 354, 373. And in the present case, although the agent committed larceny, he was empowered to sell, and this, though to a limited class, constituted an intrusting according to the accepted meaning of the term. *Baines* v. *Swainson*, *supra*; see *Phillips* v. *Huth*, 6 M. & W. 572, 598.

TAXATION — PARTICULAR FORMS OF TAXATION — NEW YORK STOCK TRANSFER TAX. — A New York statute imposed on all sales of stock in domestic

or foreign corporations a tax of two cents "on each one hundred dollars of face value or fraction thereof." A Connecticut vendor sold in New York to a Connecticut vendee shares in two foreign corporations without paying the tax. He was arrested and brought *habeas corpus*. *Held*, that the writ be dismissed, as the tax is constitutional. *People ex rel. Hatch* v. *Reardon*, U. S. Sup. Ct., Jan. 7, 1907.

For a discussion of this case in a lower court, see 19 HARV. L. REV. 460.

TAXATION — PARTICULAR FORMS OF TAXATION — SUCCESSION TAX ON NON-RESIDENTS' LIFE INSURANCE POLICIES. — A New York statute imposed a succession tax of five per cent on all "property within the state" belonging to a non-resident decedent. A New York corporation issued to a resident of New Jersey a life insurance policy which was always kept in that state. A New Jersey statute required the corporation, as a condition precedent to doing business in that state, to accept service of process on a state official. At the decedent's death the corporation had assets in New Jersey sufficient to satisfy his claim. *Held*, that the policy is not subject to the New York tax. *Matter of Gordon*, 186 N. Y. 471.

Courts are slow to extend general property taxes to life insurance policies because of practical difficulties of computation. *State Board* v. *Holliday*, 150 Ind. 216. This objection obviously does not apply to inheritance taxes; residents' policies are subject to such taxes as creditors' assets. *Matter of Knoedler*, 68 Hun 150; aff. 140 N. Y. 377. New York courts originally recognized a lack of jurisdiction to tax non-residents' policies, wherever deposited. *Matter of Horn*, 39 N. Y. Misc. 133. Whether they have adopted recent federal dicta, allowing the taxation of debts at the debtor's domicile, is yet uncertain. See *Blackstone* v. *Miller*, 188 U. S. 189; 20 HARV. L. REV. 313. A dissenting judge below argues forcefully that they have. See *Matter of Gordon*, 114 N. Y. App. Div. 202. But in the principal case the court points out that the reasoning of the federal dicta does not apply, for the creditor need no longer seek aid from the debtor's state to collect his claim in view of the New Jersey statute. The court is so obviously indisposed to jeopardize the mammoth insurance business of New York that it is idle to speculate on the result in the absence of such legislation. Nor does it intimate what it shall do as to other choses in action, similarly situated, such as annuities or letters of credit. The state regulation of foreign corporations relied on is not peculiar to insurance companies. See BEALE, FOR. CORP., §§ 117, 141–196.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE ASSIGNABILITY OF CONTRACT. — An assignment of a contract is in fact a power of attorney,[1] or the creation of an agency, so that in general any contract that may be performed through an agent and does not in its terms contemplate personal performance may be assigned. Assignments, valid and invalid, may be divided into three broad classes: (*a*) an assignment of a chose in action; (*b*) a power of attorney to perform and to receive performance; (*c*) an assignment of rights coupled with a delegation of duties.[2] Assignments under class (*a*) are generally valid, and the consent or even objection of the debtor is immaterial. For performance to the agent gives a discharge of the debt, and the assignee, being a mere agent, is subject to all the equities good against the assignor,[3] provided the chose in action has not the further quality

[1] See 3 HARV. L. REV. 337, 340.
[2] *Cf.* 18 HARV. L. REV. 23.
[3] Wald's Pollock, Contracts, 3 ed., 222.